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SURESH KUMAR ACHUTHAN KRISHNAN v. LEMBAGA KELAYAKAN PROFESION UNDANG-UNDANG, MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
B [JUDICIAL REVIEW NO: WA-25-462-08-2022]
23 APRIL 2024

Abstract – *(i) The Legal Profession Qualifying Board ('Board'), under the Legal Profession Act 1976, has the autonomy to establish the prerequisites for registering for the Certificate in Legal Practice ('CLP') examination. The autonomy is recognised by the courts as matters within the prerogative of the relevant institution. When the Board's decision is made in accordance with the applicable guidelines, such decision is not tainted with any error of law or irrationality that warrants the intervention of the court. There is no duty imposed on law for the Board to accept all applications for registrations for the CLP examination; (ii) An applicant is not entitled to initiate a judicial review proceeding against the Board when he has failed to exhaust the grievance procedure under s. 26 of the Legal Profession Act 1976 before filing a judicial review application before the court.*

ADMINISTRATIVE LAW: *Exercise of administrative powers – Judicial review – Application for leave – Decision of Legal Profession Qualifying Board rejecting applicant's application to register for Certificate in Legal Practice ('CLP') examination on basis that applicant only obtained 'compensated pass' in core subject for law degree – Whether impugned decision made in accordance with applicable guidelines – Whether impugned decision purportedly retrospective, invalid, irrational and unreasonable – Whether applicant had legitimate expectation to be registered for CLP Examination – Whether applicant had clear and specific legal right to reliefs sought – Whether Board retain discretion to accept or reject applications to register for CLP examination – Whether impugned decision tainted with error of law warranting intervention of court – Legal Profession Act 1976, ss. 3 & 4 – Rules of Court 2012, O. 53 r. 3(2)*

ADMINISTRATIVE LAW: *Judicial review – Application for leave – Preliminary objections raised – Whether application for judicial review filed prematurely – Whether defective – Whether applicant exhausted grievance procedure before resorting to judicial review – Whether judicial review application premised on misconceived notion – Whether there was failure to adequately plead case in judicial review statement – Whether applicant complied with O. 53 r. 3(2) of Rules of Court 2012*

The respondent was established under s. 4 of the Legal Profession Act 1976 ('LPA') and was empowered to decide on the qualifications which may entitle a person to become a 'qualified person' within the meaning of s. 3 of the LPA for the purposes of admission as an advocate and solicitor in Malaysia. On 18 March 1995, the respondent issued the New Guidelines on Qualifications and Requirements to Qualify to Sit for the Malaysian Certificate in Legal Practice (CLP) Examination (for Law Degrees from the United Kingdom) ('1995 Guidelines') which states, amongst others, the requirements for persons to qualify to be registered for the CLP examination. It was the respondent's established guideline that the recognised qualification for the purposes of registration for the CLP examination requires a candidate to have obtained a 'pass' for the core subjects in the candidates' LLB examination. On 4 September 2020, the applicant logged in through the e-portal of the respondent ('e-LPQB') before the 2021 CLP examination was open for registration. The applicant was not considered to have a valid application to register for the 2021 CLP examination at this time because candidates who wished to be properly registered for the 2021 CLP examination must register through the e-LPQB portal, only when it was formally open for registration between 1 January 2021 and 31 January 2021. At a meeting of the respondent on 13 August 2021 ('13 August meeting'), the respondent decided that candidates who had received a 'compensated pass' for any of their core subjects would not be eligible to be registered for the CLP examination. On 10 December 2021, the applicant submitted his application to be registered for the 2022 CLP examination. On 24 May 2022, it was published on the respondent's e-LPQB portal that the application by the applicant to be registered for the CLP examination was rejected on the basis that 'calon tidak mematuhi syarat lulus enam subjek teras. Calon memperoleh 'compensated pass' dalam subjek 'Property Law' iaitu salah satu subjek teras' ('impugned decision'). The applicant's appeals to the respondent against the impugned decision was rejected. The respondent stated that the decision of 25 May 2022 to reject the applicant's application to be registered for the CLP examination was permanent and final. By way of the University of London's email to the respondent on 1 November 2022, the respondent received a response on how the applicant had received a 'compensated pass' in Property Law in which it was revealed that the applicant had narrowly failed the Property Law module on two out of three attempts and was, therefore, only eligible to be granted a 'compensated pass' in Property Law as per reg. 8.7 for the University of London Undergraduate Laws 2018-2019 Regulations. In essence, the applicant had failed one of the 12 core subjects and was deemed ineligible to register for the CLP examination as he had failed to meet the criteria required of him as prescribed under the applicable guidelines. The applicant thus filed an application for judicial review (encl. 8) under O. 53 of the Rules of Court 2012 ('ROC'). Leave was granted to the applicant for application for judicial review against the respondent to seek the following reliefs, *inter alia,* (i) a declaration that the said decision made at the 13 August 2021 meeting as

A inapplicable to the applicant's purported application dated 4 September 2020; (ii) a *certiorari* order of the impugned decision; and (iii) a *mandamus* order that the respondent immediately register the applicant as a candidate for the CLP examination. The grounds of the relief sought were based on the contention that the impugned decision by the respondent was invalid, wrong,
B unreasonable, irrational and arbitrary. The applicant submitted that the respondent's imposition of the said decision, made in the 13 August 2021 meeting, in determining the applicant's purported application dated 4 September 2020 was retrospective, unfair, irrational and had prejudiced the applicant from being registered as a candidate for the CLP examination. The
C applicant also claimed that he had a legitimate expectation to register for the CLP examination at the time of the making of his purported application dated 4 September 2020 and that any changes to the entry requirements by the respondent would not affect the substantive rights of the applicant in its application to register for the CLP examination. At the outset of the hearing,
D the respondent raised a preliminary objection ('PO') on the following grounds: (i) the judicial review application was filed prematurely as the applicant had not exhausted the grievance procedure before resorting to the judicial review; (ii) the judicial review was premised on a misconceived notion; and (iii) the applicant had not complied with O. 53 r. 3(2) of the ROC by failing to adequately plead their case in the judicial review statement.

E **Held (dismissing application for judicial review):**

(1) Section 26 of the LPA clearly shows that there are provisions in the LPA for appeals against the decisions of the respondent. The applicant could not unilaterally ignore this avenue of appeal. In choosing to do so,
F this judicial review application was defective. Since the subject matter concerned was the decision of the respondent, instead of applying to a judge for a review of the decision by way of originating summons, the applicant had short circuited by filing the present judicial review application. Therefore, the applicant was not entitled to initiate a
G judicial review proceeding against the respondent as the applicant failed to exhaust the grievance procedure, under s. 26 of the LPA, before filing this judicial review application. The failure of the applicant to exhaust the recourse or remedies under s. 26 of the LPA was a bar for a proceeding under judicial review. It would also be an abuse of court
H process which made the judicial review application premature. (paras 17-24)

(2) On 4 September 2020, the applicant had only logged in or accessed the e-LPQB portal through the 'Daftar Pemohon' page. However, no formal application for the CLP examination was made. The purpose of 'Daftar
I Pemohon' was for '... Calon yang ingin membuat permohonan, perlu mendaftar terlebih dahulu.' This was distinct from 'Pendaftaran Permohonan Peperiksaan' which was specifically used for the CLP examination registration. The latter page was not accessed by the applicant on 4 September 2020. This was merely a pre-application step

which was not the required application to register for the CLP examination. The applicant's argument, that his application to register for the CLP examination commenced upon accessing the 'Daftar Pemohon' page, was therefore without any basis. (paras 40 & 41)

(3) The applicant's purported registration on 4 September 2020 preceded and was not within the prescribed time frame for the registration of the 2021 CLP examination which was from 1 January 2021 and 31 January 2021. The applicant could not be considered as having registered for the CLP examination on 4 September 2020. There was no avenue for pre-registration outside of, or in advance of, the prescribed time frame for registration. Thus, the impugned decision could not have been made in relation to the purported application on 4 September 2020 since the applicant had not validly applied for registration for the CLP examination at that time. The applicant had only registered for the 2022 CLP examination on 10 December 2021. It was this application that was rejected by the respondent, resulting in the impugned decision. Therefore, since the judicial review was based on an erroneous assumption that the applicant had made an application to register for the CLP examination on 4 September 2020, this judicial review ought to be dismissed. (paras 46-51)

(4) The applicant failed to satisfy the requirements of O. 53 r. 3(2) of the ROC. This was because the statement failed to state the basis on which the impugned decision was allegedly perverse, unfair and irrational due to the purported inconsistency with the respondent's non-processing of the applicant's application for the CLP examination for non-compliance with the A-levels examination requirement under the 1995 Guidelines. Based on O. 53 r. 3(2) of the ROC, the statement must set out the name and description of the applicant, the relief sought and the grounds on which it was sought. It is also trite law that the grounds omitted in the statement could not be relied upon at the hearing. The principle that a party is bound by his own pleading applied. The applicant was not allowed to ventilate arguments that were not placed in the statement. As such, this judicial review should be dismissed given the patent inadequacy of the statement. The PO raised by the respondent had merits. (paras 52-63)

(5) As the premise of the applicant's argument concerned retrospectively, the timing of the applicant's application to be registered for the CLP examination held the utmost significance. The respondent decided at the 13 August 2021 meeting that candidates who have received a 'compensated pass' for any of their core subjects would not be eligible to be registered for the CLP examination. The applicant had only validly applied to be registered for the CLP examination on 10 December 2021 (and not 4 September 2020 as alleged). It was clear that the decision made in the 13 August 2021 meeting preceded the

applicant's registration for the CLP examination. Therefore, the impugned decision was premised on the respondent's rejection of the applicant's 2022 CLP examination registration on 10 December 2021 which occurred after the 13 August 2021 meeting and not the appellant logging into the e-LPQB portal on 4 September 2020. The question of retrospectivity of the impugned decision did not arise. (paras 65-70)

(6) The respondent, under the Act, has the autonomy to establish the prerequisites for registering for the CLP examination. The autonomy is recognised as matters within the prerogative of the relevant institution. The respondent had established that candidates must achieve a 'pass' for all six core subjects of the LLB to be eligible for the CLP examination registration. The 1995 Guidelines made no mention of accepting a 'compensated pass' as equivalent to a 'pass.' It was evident from the University of London's emails that, when candidates receive a 'compensated pass', it means that they had in fact failed that particular module. Therefore, the applicant had in fact failed one of his core subjects, being Property Law, before he was given a 'compensated pass.' It was well within the respondent's authority to equate a 'compensated pass' to a 'fail' under the 1995 Guidelines. Prevailing academic judgment in this context rested with the respondent itself, being the statutory body empowered to uphold the requisite standard for admission into the Malaysian Bar. At all material times, a 'compensated pass' does not qualify as a 'pass' for any core subjects for the purpose of eligibility to be registered for the CLP examination. (paras 79-88)

(7) The respondent's attempt to seek clarification from the University of London regarding the criteria for awarding the grade of 'compensated pass' to other candidates could hardly be regarded as irrelevant to the applicant's case. The essence of these inquiries was to comprehend the basis upon which the University of London assigned the 'compensated pass' grade, and for the respondent to decide if the said grade aligned with its eligibility criteria for registering for the CLP examination. In light of the rejection of various applications akin to the applicant's and the efforts made by the respondent to seek clarification from the University of London, relevant considerations have been properly taken into account by the respondent. The impugned decision was therefore not unfair, illegal or irrational in the *Wednesbury* sense, and was not based on the retrospective application of guidelines or the said decision made at the 13 August 2021 meeting. (paras 98-104)

(8) The respondent had always required candidates to have obtained a 'pass' for the core subjects in the candidates' LLB examination from as early as 1995 and had never accepted a 'compensated pass.' It was not proper for the applicant to argue that the absence of prohibition against a 'compensated pass' must mean that the same was acceptable. The respondent had not made any such representation to the applicant that he would be registered for the CLP examination. In fact, the registration

process had always been qualified by the very existence of the 1995 Guidelines which set out the terms of registration. Further, the respondent was never bound to accept an applicant to be registered for the CLP examination until the applicant had officially been informed of their acceptance as a candidate. The applicant was, at all material times aware that he would have to wait for an official response from the respondent for his application. The respondent retained the discretion to accept or reject applications to register for the CLP examination. The applicant could not have had a legitimate expectation to be registered for the CLP examination as of 4 September 2020 as there was no 'pending' application made by the applicant on 4 September 2020 to register for the CLP examination. The applicant had not provided any basis as to how a legitimate expectation had arisen and thus, his claim of legitimate expectation ought to be dismissed. (paras 111-125)

(9) For the court to grant leave, the applicant must produce all relevant and material facts/documents/cause papers before the court could fully determine if the applicant had *prima facie* an arguable case for the relief being sought and that the said application was neither frivolous nor vexatious. The applicant failed to adhere to its duty of full and frank disclosure in this judicial review at the leave stage, by failing to exhibit all the relevant documents to ensure that the court had a complete picture of the case. Had the applicant disclosed the fact that he had made an application in December 2021 and had made a payment as part of the registration at the leave stage, the retrospective point would have been a non-starter as the applicant's application to sit for the CLP examination did not precede the decision at the 13 August 2021 meeting, but the application made after the decision and would apply to bind his application. The material non-disclosure was a deliberate act to sustain a legal point that would not otherwise be open to the applicant. (paras 138-141)

(10) The applicant failed to satisfy the requirements of a *mandamus* order as: (i) the applicant did not have a clear and specific legal right in the Act, any statute or otherwise to the relief sought; (ii) there was no duty imposed on law for the respondent to accept all applications for registrations for the CLP examination; (iii) the respondent retained the discretion to accept or reject applications to register for the CLP examination; and (iv) the applicant had an alternative remedy, other than by way of *mandamus*, pursuant to s. 26 of the Act to review the decision of the respondent. Thus, the decision to reject the applicant's application to register for the CLP examination was valid, made in good faith and was reasonable. The decision of the respondent was not tainted with any error of law, irrationality and/or unreasonableness that warranted the intervention of this court. (paras 140-154)

Case(s) referred to:

Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Ambiga Sreenevasan v. Director Of Immigration, Sabah, Noor Alam Khan A Wahid Khan & Ors [2017] 9 CLJ 205 CA ***(refd)***

Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v. Soo Lina & Ors [2018] 6 CLJ 285 CA ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] CLJU 5; [1981] 1 LNS 5 FC ***(refd)***

In Re Preston [1985] 1 AC 835 ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] CLJU 56; [1972] 1 LNS 56 HC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Mior Rosli Mior Mohd Jaafar v. Mahkamah Perusahaan Malaysia & Anor [2010] CLJU 1539; [2010] 1 LNS 1539 HC ***(refd)***

Ong See Teong & Anor v. Tenaga Nasional Bhd [2008] 8 CLJ 831 HC ***(refd)***

Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal [2014] 3 CLJ 733 CA ***(refd)***

President Hotel Sdn Bhd v. Datuk Bandar & Anor; Crest Trading Sdn Bhd (Intervener) [1995] CLJU 167; [1995] 1 LNS 16 HC ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***

Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor [2010] MLJU 605 ***(refd)***

Setapak Tin Mines Syndicate Ltd & Anor v. Khoo Nean Tee & Ors [1970] CLJU 146; [1970] 1 LNS 146 FC ***(refd)***

Sivapalan Govindasamy v. Universiti Malaya [2020] 9 CLJ 638 CA ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

Stephen Kalong Ningkan v. Tun Abang Hj Openg & Tawi Sli (No 2) [1966] CLJU 185; [1966] 1 LNS 185 HC ***(refd)***

Sunway University College v. Mahkamah Perusahaan Malaysia & Anor [2019] 7 CLJ 55 CA ***(refd)***

Suruhanjaya Perkhidmatan Awam Malaysia v. Noordin Hassan [1996] 1 CLJ 274 CA ***(refd)***

Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2018] 2 CLJ 762 CA ***(refd)***

Tenaga Nasional Bhd v. Chew Thai Kay & Anor [2022] 2 CLJ 333 FC ***(refd)***

Tenaga Nasional Bhd v. Tan Sooi Lek & Ors [2022] 6 CLJ 177 FC ***(refd)***

Thanimalai & The Government of Malaysia v. Lee Ngo Yew [1974] CLJU 177; [1974] 1 LNS 177 FC ***(refd)***

Trustees Of Dennis Rye Pension Fund [1997] 4 All ER 747 ***(refd)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors [2000] 4 CLJ 882 CA ***(refd)***

Yick Hoe Ferrous Steel Sdn Bhd v. Tribunal Rayuan Kastam & Ors [2011] 7 CLJ 544 HC ***(refd)***

YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor [2021] 8 CLJ 179 FC ***(refd)***

Zakiah Ishak v. Majlis Daerah Hulu Selangor [2005] 4 CLJ 77 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, Schedule, para 1
Legal Profession Act 1976, ss. 3, 4, 26
National Land Code, s. 425
Rules of Court 2012, O. 53 rr. 1(2), 3(2)
Specific Relief Act 1950, s. 44

For the applicant - Paari Perumal & A P Puthan Perumal; M/s Perumal Brothers
For the respondent - Steven Thiruneelakandan, David Dinesh Mathew & Illysa Jace Chakrabarty; M/s Steven Thiru and Sudhar Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The applicant filed an application for judicial review (encl. 8) under O. 53 of the Rules of Court 2012 (ROC).

[2] Leave was granted to the applicant for application for judicial review against the respondent to seek the following reliefs:

(i) a declaration that the said decision made at the 13 August 2021 meeting (which was communicated to the applicant *via* the respondent's letters dated 15 June 2022 and 23 June 2022) is inapplicable to the applicant's purported application dated 4 September 2020;

(ii) *certiorari* of the impugned decision dated 24 May 2022;

(iii) a declaration that the applicant satisfies all requirements and is eligible to sit for the certificate in legal practice (CLP) examination;

(iv) a declaration that the applicant's purported application dated 4 September 2020 is for the applicant to be registered as a candidate for the CLP examination; and

(v) a *mandamus* order that the respondent immediately registers the applicant as a candidate for the CLP examination.

[3] In essence, the applicant filed this judicial review to obtain reliefs in relation to the decision of the respondent to reject the applicant's application to register for the CLP examination.

[4] After the hearing, I dismissed the applicant's judicial review application (encl. 8). I will now set out the grounds for my decision.

Background Facts

[5] The narration of the background facts herein is adopted with and/or without modification from the written submission of the respondent and can be summarised as follows:

(i) the respondent was established under s. 4 of the Legal Profession Act 1976 (LPA), and is empowered to decide on the qualifications which may entitle a person to become a "qualified person" within the meaning of s. 3 of the LPA for the purposes of admission as an advocate and solicitor in Malaysia.

(ii) on 18 March 1995, the respondent issued the 'New Guidelines on Qualifications and Requirements to Qualify to Sit for the Malaysian Certificate in Legal Practice (CLP) Examination (for Law Degrees from the United Kingdom)' (the 1995 Guidelines), which states, amongst others, the requirements for persons to qualify to be registered for the CLP examination.

(iii) Part I r. D(iv) of the 1995 Guidelines prescribes the criteria to be satisfied before a law degree is recognised:

D. Subjects

(i) the law degree shall contain a minimum of 12 law subjects,

AND

(ii) the 12 law subjects shall include the following 6 core subjects:

(a) Law of Contract

(b) Law of Torts

(c) Constitutional Law

(d) Criminal Law

(e) Land Law, and

(f) Equity and Trusts,

(iii) each of the core-subjects as in (ii) above, shall be studied for the duration of one academic year.

AND

(iv) candidates must pass all the core subjects mentioned in (ii) above

(iv) on 17 June 2005, the respondent issued 'a statement on six core subjects' that stated, amongst others, as follows:

According to the New Guidelines, candidates must pass the following six core subjects, out of a minimum of twelve law subjects and each of the core subjects shall be studied for the duration of one academic year. They are:

(i) Law of Contract

(ii) Law of Torts

(iii) Constitutional Law

(iv) Criminal Law

(v) Land Law

(vi) Equity & Trusts

(v) accordingly, it is the respondent's established guideline that the recognised qualification for the purposes of registration for the CLP examination requires a candidate to have obtained a 'pass' for the core subjects in the candidates' LLB examination.

(vi) on 4 September 2020, the applicant logged in through the e-portal of the respondent (known as 'e-LPQB') before the 2021 CLP examination was open for registration.

(vii) the applicant was not considered to have a valid application to register for the 2021 CLP examination at this time. This is because candidates who wish to be properly registered for the 2021 CLP examination must register through the e-LPQB portal, only when it is formally open for registration between 1 January 2021 and 31 January 2021.

(viii) at a meeting of the respondent on 13 August 2021 (the 13 August 2021 meeting), the respondent decided that candidates who have received a 'compensated pass' for any of their core subjects will not be eligible to be registered for the CLP examination.

(ix) on 10 December 2021, the applicant submitted his application to be registered for the 2022 CLP examination.

(x) on 24 May 2022, it was published on the respondent's e-LPQB portal that the application by the applicant to be registered for the CLP examination was rejected on the basis that "calon tidak mematuhi syarat lulus enam subjek teras. Calon memperoleh "compensated pass" dalam subjek "Property Law" iaitu salah satu subjek teras" (the impugned decision).

(xi) by way of a letter dated 7 June 2022, the applicant purported to appeal to the respondent against the decision to reject his application to be registered for the CLP examination.

(xii) by way of a letter dated 15 June 2022, the respondent rejected the applicant's purported appeal to be registered for the CLP examination.

(xiii) by way of a letter dated 17 June 2022, the applicant purported to again appeal to the respondent against the decision to reject his application to be registered for the CLP examination.

(xiv) by way of a letter dated 23 June 2022, the respondent again rejected the applicant's purported appeal to be registered for the CLP examination and stated that the respondent's decision of 24 May 2022 to reject the applicant's application to be registered for the CLP examination was permanent and final (kekal dan muktamad).

(xv) by way of the University of London's email to the respondent on 1 November 2022, the respondent received a response on how the applicant received a 'compensated pass' in property law. In this regard, the University of London had, amongst others, stated that:

(a) the applicant made three attempts (the maximum number of attempts) at the Property Law module;

(b) the applicant narrowly failed the Property Law module on two of these said attempts; and

(c) the applicant was therefore only eligible to be granted a 'compensated pass' in Property Law as per reg. 8.7 for the University of London Undergraduate Laws 2018-2019 Regulations, which reads as follows:

> If you fail a module three times you may be eligible for a 'compensated pass' in respect of one module only provided you **achieve a mark of 35%-39% at one of the attempts**.
> (emphasis added)

(xvi) in essence, the applicant had failed one of the 12 core subjects.

(xvii) the applicant was therefore deemed ineligible to register for the CLP examination as he had failed to meet the criteria required of him as prescribed under the applicable guidelines.

The Grounds For The Judicial Review

[6] The grounds of the reliefs sought are based on the contention that the impugned decision by the respondent was invalid, wrong, unreasonable, irrational and arbitrary. These contentions are grouped into the following two grounds:

(i) the retrospectivity ground:

(a) the respondent's imposition of the said decision made at the 13 August 2021 meeting in determining the applicant's purported application dated 4 September 2020 was retrospective, unfair, irrational, unreasonable and had prejudiced the applicant from being registered as a candidate for the CLP examination;

(b) at all material times, a "compensated pass" was accepted by the respondent as a "pass";

(c) the respondent was aware of the applicant's "compensated pass" since 2 June 2020 but the respondent did not raise any issue or objection to that until after the applicant's purported application dated 4 September 2020;

(d) the impugned decision was purportedly retrospective, unfair, irrational and unreasonable; and

(e) the said decision made at the 13 August 2021 meeting was inapplicable to the applicant's purported application dated 4 September 2020.

(ii) the legitimate expectation ground:

(a) the applicant had a legitimate expectation to register for the CLP examination at the time of making his purported application dated 4 September 2020;

(b) the applicant had a legitimate expectation that any changes to the entry requirements by the respondent would not affect the substantive rights of the applicant in its application to register for the CLP examination; and

(c) the impugned decision resulted in negative effects on the applicant's future to start his career as an advocate and solicitor.

The Law

[7] Judicial review is generally concerned with the decision-making process where the impugned decision is flawed on the grounds of procedural impropriety.

[8] However, the law has now developed to allow a decision to be challenged on the grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

[9] It is settled law that the High Court will not interfere with a decision of the respondent unless it can be established that the decision is infected with errors of law.

[10] In the Federal Court case of *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 3 MLRA 589; [2018] 2 MELR 337; [2018] 2 MLJ 537, the liberal approach on judicial review in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 has been re-emphasised as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
>
> > It is often said that judicial review is concerned not with the decision but the decision-making process. (See *eg*, *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in ***Council of Civil Service Unions & Ors v. Minister for the Civil Service*** **[1985] AC 374**, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that ***such a* decision is also open a challenge on grounds of 'illegality' and 'irrationality' and in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance**.

In this context, it is useful to note how Lord Diplock (at pp. 410-411) defined the three grounds of review, *to wit*, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:

> **By 'illegality'** as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> **By 'irrationality'**, I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as '**procedural impropriety**' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> Lord Diplock also mentioned '**proportionality**' as a possible fourth ground of review which called for development.
>
> (emphasis added)

[11] Further, the Court of Appeal in *Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v. Soo Lina & Ors* [2018] 6 CLJ 285; [2018] 1 MLRA 683; [2018] 1 AMR 436; [2018] 2 MLJ 738 explained the test of reasonableness in a judicial review as follows:

[39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in *The State (at the Prosecution of John Keegan and Eoin J Lysaght) v. The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are:

1. It is fundamentally at variance with reason and common sense;
2. It is indefensible for hearing in the teeth of plain reason and common sense; and
3. Because the court is satisfied that the decision-maker has breached his obligation whereby the 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.

[41] In *Meadows v. Minister For Justice Equlity And Law Reform And Others* [2010] IESC 3 Denham J in her *dicta* (*ratio*) set out the following test:

> This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. *Inter alia*, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises *inter alia* from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision; (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on or rational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

[12] In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 AMR 3529; [1999] 3 MLJ 1, where it states:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, *etc*' kind, *judicial review will lie to impeach all errors of law made by an administrative body or tribunal and*, we would add, inferior courts. In the words of Lord Denning in *Pearlman v. Harrow School* (*ibid*) at p 70, ... *no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it*.
>
> (emphasis added)

[13] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the respondent had, among others:

(i) asked itself the wrong questions;

(ii) considered irrelevant matters;

(iii) failed to take relevant matters into consideration;

(iv) failed to apply the proper principle(s) of law; and/or

(v) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

Preliminary Objection (PO)

[14] At the outset of the hearing, learned counsel for the respondent raised a PO on the following grounds:

(i) the judicial review application was filed prematurely and defective as the applicant had not exhausted the grievance procedure before resorting to the judicial review;

(ii) the judicial review is premised on a misconceived notion; and

(iii) the applicant has not complied with O. 53 r. 3(2) of the ROC by failing to adequately plead their case in the judicial review statement.

The Decision Of The Court

The Judicial Review Application Was Filed Prematurely And Defective As The Applicant Had Not Exhausted The Grievance Procedure Before Resorting To The Judicial Review

[15] It is to be noted that the applicant is challenging the decision of the respondent to reject the applicant's application to register for the CLP examination.

[16] Section 26 of the LPA provides as follows:

Reviews

26. Appeal from the decision of Board to Judge

(1) *Any person dissatisfied with any decision of the Board may apply to a Judge for a review of the decision.*

(2) If the Board fails to determine any request within six weeks after it has been first submitted to it, the applicant may apply under this section as if the request had been determined adversely to him.

(3) *Every application under this section shall be made by summons in chambers on the petition of the appellant if he has filed a petition, otherwise by originating summons; the Judge hearing the application may in his discretion adjourn the application into open Court.*

(4) Every summons in chambers or originating summons, as the case may be, shall be supported by evidence on affidavit and shall be served together with the affidavit on the Board; such summons in chambers or originating summons shall not be heard before the expiry of twelve days after the date of service on the Board.

(5) At or before the hearing of the application the Board may submit to the Judge a confidential report on the applicant; such report shall not be filed in court but a copy thereof shall be furnished to the applicant.

(6) A confidential report under this section shall be privileged.

(7) ...

(8) ...

(emphasis added)

[17] Section 26 of the LPA above clearly shows that there are provisions in the LPA for appeals against the decisions of the respondent. The applicant cannot unilaterally ignore this avenue of appeal. In choosing to do so, this judicial review application is defective.

[18] It is my view that since the subject matter concerned is the decision of the respondent, instead of applying to a judge for a review of the decision by way of originating summons, the applicant had short-circuited by filing the judicial review application to this court.

[19] Therefore, it is my view that the applicant therein is not entitled to initiate a judicial review proceeding against the respondent herein as the applicant had failed to exhaust the grievance procedure under s. 26 of the LPA before filing this judicial review application before this court.

[20] In *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505; [2010] 1 MELR 61; [2010] 2 MLRA 571; [2011] 2 MLJ 457, the Federal Court was posed with the following question:

whether the existence of a statutory appeal procedure/alternative remedy is a bar to judicial review or declaratory relief.

The Federal Court referred to the speech by Lord Templeman in *Re Preston* [1985] 1 AC 835 that:

Judicial review process should not be allowed to supplant the normal statutory appeal procedure.

And answered the question in the positive.

[21] The Federal Court decision in *Robin Tan Pang Heng* (*supra*) is therefore an authority for the proposition that the existence of a statutory appeal procedure is a bar to judicial review.

[22] Further, in the case of *Yick Hoe Ferrous Steel Sdn Bhd v. Tribunal Rayuan Kastam & Ors* [2011] 7 CLJ 544; [2010] 3 MLRH 454, Aziah Ali J (as she then was) held that:

[5] *The applicant should have exhausted the appeal process before resorting to the courts. Based on the clear provision of the Regulation, it would be wrong for the court*

A *to intervene at this stage, as it would tantamount to interfering with the 1st respondent from hearing the appeal pending before it*, and its right under the law to adjudicate the matter, (paragraph 23)

(emphasis added)

[23] Further reference is made to the case of *Pengarah Kastam Negeri Johor* B *& Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal* [2014] 3 CLJ 733; [2014] 5 MLRA 324; [2014] 4 MLJ 377; [2014] AMTC 63 where the Court of Appeal held:

[19] Again, with regard to the statutory remedy as contained under s. 68 of the Sales Tax Act 1972 (*supra*) we are of the view that the position in C such a case is rather trite. This court is guided by a slew of cases emanating from high authority such as *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80; [1970] 2 MLJ 41; *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; 2 MLJ 185 and *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505. These cases have decided that *where a statute has provided* D *for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism. In other words, the respondent is statutorily obliged to exhaust that remedy first before running, as it were, to the courts for what is essentially a discretionary relief*. The apex court in the *Robin Tan* case (*supra*) was guided by what Lord Templeman had said in the *Re Preston* case [1985] 1 AC 835 to the following effect:

E

> Judicial review process should not be allowed to supplant the normal statutory appeal procedure.
>
> (emphasis added)

[24] Thus, the failure of the applicant to exhaust the recourse or remedies F under s. 26 of the LPA is a bar for a proceeding under judicial review. It would also be an abuse of the court process which makes the judicial review application premature.

[25] The applicant, on the other hand, submits that he is exempt from following the statutorily prescribed appeal procedure under s. 26 of the LPA G for the following broad reasons:

(i) section 26 of the LPA is not mandatory;

(ii) section 26 of the LPA is an additional remedy, and does not preclude judicial review; and

H (iii) the relief sought in a judicial review provides a more efficacious remedy to the applicant's grievances.

[26] The applicant sought to rely on the following cases to justify the non-exhaustion of the statutory appeal procedure under s. 26 of the LPA:

I (i) *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697; [2002] 1 MLRA 145; [2002] 2 MLJ 413; [2006] 1 AMR 11;

(ii) *Tenaga Nasional Bhd v. Tan Sooi Lek & Ors* [2022] 6 CLJ 177; [2022] 5 MLRA 104; [2022] 4 MLJ 236; and

(ii) *Setapak Tin Mines Syndicate Ltd & Anor v. Khoo Nean Tee & Ors* [1970] CLJU 146; [1970] 1 LNS 146; [1970] 1 MLRA 445; [1970] 2 MLJ 191.

[27] A plain reading of s. 26 of the LPA mandates that the mode of appealing against a decision of the respondent must be made by way of a summons in chambers if an application is made; otherwise, by originating summons.

[28] The mandatory nature of s. 26 of the LPA is clear from the provision itself, which states as follows:

> (3) Every application under this section **shall be made by summons in chambers on the petition of the appellant if he has filed a petition otherwise by originating summons**; the Judge hearing the application may in his discretion adjourn the application into open Court.
>
> (emphasis added)

[29] This court is of the view that if a mode of challenge is prescribed by law, the applicant must utilise that mode of challenge.

[30] I find support for my view by referring to the case of *Tenaga Nasional Bhd v. Chew Thai Kay & Anor* [2022] 2 CLJ 333; [2022] 2 MLJ 25; [2022] 2 MLRA 178; [2022] 1 AMR 721, where the Federal Court held:

> [40] ... Where a statute creates a right and, in plain language, gives a specific remedy for its enforcement, a party seeking to enforce the right must resort to that remedy and not to others ...

(See also: *Stephen Kalong Ningkan v. Tun Abang Hj Openg & Tawi Sli (No 2)* [1966] CLJU 185; [1966] 1 LNS 185; [1967] 1 MLJ 46; and *Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor* [2010] MLJU 605)

[31] Further, this court is of the view that the word "may" does not render the provision discretionary (see the Federal Court in *Thanimalai & The Government Of Malaysia v. Lee Ngo Yew* [1974] CLJU 177; [1974] 1 LNS 177; [1974] 1 MLRA 169; [1975] 1 MLJ 125). Accordingly, the applicant's reliance on *Sivarasa Rasiah* (*supra*) is distinguishable on the following grounds:

(i) the case did not concern judicial review in the context of an available statutory appeal procedure; and

(ii) further, the Court of Appeal's reference to the *Trustees Of Dennis Rye Pension Fund* [1997] 4 All ER 747 concerning the absence of prejudice in commencing a judicial review holds no relevance here. Unlike our case, there was an absence of an alternate and efficacious statutory appeal procedure in that English case.

[32] The applicant's reliance on *Setapak Tin Mines Syndicate Ltd* (*supra*) is inapplicable as the additional remedy under s. 425 of the National Land Code 1965 (NLC) is not an appeal procedure. Instead, it allows the Collector under the NLC to obtain the assistance of police officers in the exercise of its powers. This stands in contrast to s. 26 of the LPA, which prescribes a distinct avenue for appeal through summons-in-chambers and/or originating summons.

[33] Further, I find the facts in *Tan Sooi Lek* (*supra*) differ from the instant case for the following reasons:

(i) the case concerns the availability of injunctive relief given the availability of criminal sanctions. In contrast, one of the issues in our case is the correct procedure to adopt (*ie*, judicial review under O. 53 of the ROC or s. 26 of the LPA), rather than the type of relief sought; and

(ii) unlike our case, there is an absence of a statutory appeal procedure in *Tan Sooi Lek* (*supra*) to preclude the application of general law.

[34] It is clear from the wording of s. 26 of the LPA that the statutory appeal procedure is not an 'additional remedy', but is the exclusive method to challenge the decisions of the respondent, precluding judicial review.

[35] This is because s. 26 of the LPA, being a specific mode of appeal, excludes the application of the general law *ie*, judicial review under O. 53 of the ROC. The statutory interpretation principle of "*generalia specialibus non derogant*" (where a special provision is made in a statute, that special provision excludes the operation of a general provision in the general law), applies in the present case.

[36] Further, this court is of the view that the reliefs sought by the applicant in the form of declaration or orders can be obtained *vide* an originating summons. Therefore, the applicant's contention that the prerogative remedies sought can only be obtained in a judicial review cannot be true and devoid of merits.

The Judicial Review Is Premised On A Misconceived Notion

[37] The respondent submits that this judicial review should be dismissed as being premised on the applicant's misconceived notion that he made a valid application on 4 September 2020 for the CLP examination registration, which eventually led to the impugned decision.

[38] The question to be decided in the present case is whether the applicant did make a valid application to register for the CLP examination on 4 September 2020.

[39] The applicant contends that he had validly registered for the CLP examination on 4 September 2020 for the following reasons: A

(i) the applicant had purportedly registered through the page titled 'Daftar Pemohon' on the e-LPQB portal; and

(ii) the CLP examination registration process commenced from the applicant's purported registration through 'Daftar Pemohon'. B

[40] Based on the evidence presented before this court, this court finds that, on 4 September 2020, the applicant had only logged in or accessed the e-LPQB portal through the 'Daftar Pemohon' page. However, no formal application for the CLP examination was made. C

[41] It is to be noted that the purpose of 'daftar pemohon', as stated in the respondent's user manual, is for '... Calon yang ingin membuat permohonan, perlu mendaftar terlebih dahulu'. This is distinct from 'Pendaftaran Permohonan Peperiksaan', which is specifically used for the CLP examination registration. The latter page was not accessed by the applicant on 4 September 2020. In other words, this was merely a pre-application step which was not the required application to register for the CLP examination. D

[42] The applicant's argument that his application to register for the CLP examination commenced upon accessing the 'Daftar Pemohon' page is therefore without any basis. E

[43] Thus, this court is of the view that the document marked as exh. "SK-2" (encl. 2, p. 18) is not the applicant's submission of an application to be registered for the CLP examination.

[44] Clearly, from the facts stated above, the applicant did not complete any of the requisite processes required for the CLP examination registration, which were the following compulsory steps: F

(i) registering through the 'Pendaftaran Permohonan Peperiksaan' page on e-LPQB (encl. 15, p. 24); G

(ii) submitting an application during the official CLP examination registration period (*ie*, between 1 January 2021 and 31 January 2021) for the 2021 CLP examination (encl. 12, p. 46); and

(iii) making payment for the CLP examination registration through a provided link (encl. 15, p. 37). H

[45] Further, the email titled 'E-mel Pemberitahuan: Pendaftaran Pemohon oleh Suresh Kumar a/l Achuthan Krishnan' on 4 September 2020 (encl. 2 p. 19) does not signify the applicant's registration for the CLP examination but merely confirms that he created an account through the 'Daftar Pemohon' page, which is then to be followed by the registration in accordance with the compulsory steps stated at para. 44 above. I

[46] It is clear that the applicant's purported registration on 4 September 2020 preceded and was not within the prescribed time frame for the registration of the 2021 CLP examination, which was from 1 January 2021 and 31 January 2021 (encl. 12, p. 46).

[47] Based on the above, the applicant could not be considered as having registered for the CLP examination on 4 September 2020. Further, there is no avenue for pre-registration outside of, or in advance of, the prescribed time frame for registration.

[48] Thus, this court views that the impugned decision could not have been made in relation to the purported application on 4 September 2020, since the applicant had not validly applied for registration for the CLP examination at that time.

[49] In fact, this court finds that the applicant submitted an application to be registered for the CLP examination only on 10 December 2021 (encl. 12, pp. 21 to 22, paras. 7(3) to 7(6) and encl. 12 p. 54). In other words, the applicant only registered for the 2022 CLP examination on 10 December 2021.

[50] It was this application that was rejected by the respondent, resulting in the impugned decision.

[51] Therefore, this court is of the view that since the judicial review is based on an erroneous assumption that the applicant had made an application to register for the CLP examination on 4 September 2020, this judicial review ought to be dismissed.

The Applicant Has Not Complied With Order 53 Rule 3(2) Of The ROC By Failing To Adequately Plead Their Case In The Judicial Review Statement

[52] Having perused the cause papers, this court finds that the applicant fails to satisfy the requirements of O. 53 r. 3(2) of the ROC.

[53] This is because the statement (encl. 3) fails to state the basis on which the impugned decision was allegedly perverse, unfair and irrational due to the purported inconsistency with the respondent's non-processing of the applicant's application for the CLP examination for non-compliance with the A-levels examination requirement under the 1995 Guidelines.

[54] Order 53 r. 3(2) of the ROC states as follows:

> **An application for leave must be made** *ex parte* to a Judge in Chambers and **must be supported by a statement setting out** the name and description of the applicant, **the relief sought and the grounds on which it is sought**, and by affidavits verifying the facts relied on.
>
> (emphasis added)

[55] Based on O. 53 r. 3(2) of the ROC, the statement must set out the name and description of the applicant, the relief sought and the grounds on which it is sought. It is also a trite law that the grounds omitted in the statement cannot be relied upon at the hearing. In this regard, the principle that a party is bound by his own pleadings applies.

[56] In the case of *Ong See Teong & Anor v. Tenaga Nasional Bhd* [2008] 8 CLJ 831; [2008] 5 MLJ 717; [2007] 4 MLRH 421, Wan Afrah Wan Ibrahim J (as she then was) held:

> [23] To my mind, as in other proceedings, counsel must always remember the general rule that *the applicants are bound by the four corners of their pleadings*. As a matter of general principle, *the applicants could only rely on the grounds and relief that were set out in the statement. It is also fatal for the applicants to raise new grounds of challenge in the affidavits in support* or tendered *Via* oral or written submission at the later hearing stage.
>
> [24] *It is also a cardinal requirement that the applicants must set out their grounds clearly in the statement supported by sufficiently detailed and comprehensive particulars of the facts and matters on which the applicants intend to rely in support of their application*. The requirement for the precision is to ensure that judicial review is conducted within the ambit or scope of the specific impugned decision.
>
> (emphasis added)

[57] *Ong See Teong*'s (*supra*) case has been followed by the Court of Appeal in the case of *Sunway University College v. Mahkamah Perusahaan Malaysia & Anor* [2019] 7 CLJ 55; [2019] MLRAU 80; [2019] 3 MLJ 749; [2019] 3 AMR 18 when Tengku Maimun Tuan Mat JCA (now Chief Justice) held as follows:

> [34] *It is a cardinal requirement that the claimant must set out her grounds clearly in the statement supported by sufficient details and comprehensive particulars of the facts and matters which the claimant sought to rely on (See Ong See Teong & Anor v. Tenaga Nasional Berhad [2008] 8 CLJ 831; [2007] 4 MLRH 421; [2008] 5 MLJ 717). The above general averments were not supported by any particulars and thus were insufficient to warrant a review on the merits by the High Court*.
>
> (emphasis added)

[58] Further, in the case of *Dr A Dutt v. Assunta Hospital* [1981] CLJU 5; [1981] 1 LNS 5; [1981] 1 MLRA 472; [1981] 1 MLJ 304, the Federal Court held:

> [27] **There appears therefore to have been a complete disregard of the procedure prescribed and to be followed** by the solicitors for the hospital. No point was however taken by counsel for Dr Dutt at any stage of the proceedings. We have however mentioned them not merely to draw attention to the fact that the new rules, the Rules of the High Court 1980 continue largely the same practice, **O. 53 r. 1(2) requiring such a statement**, rule 1A limiting the time for such an application, now, to 6 weeks of the order sought to be quashed and **r. 3(1) providing that**

subject to the discretion of the court, no grounds shall be relied upon and no reliefs sought except those set out in the statement. We have done so also because the same solicitors had previously filed such a statement in its application for prohibition and because as will be seen, this amorphous application enabled the hospital to roam at large, well outside its proper confines.

[28] Lacking the statement, the High Court resorted to the affidavit of Datuk Lee Eng Teh for the grounds on which the application was sought. We would observe that even under the old rules, O. 59 rule 6 provided that **unless the court in its discretion allowed an amendment, no grounds should be relied upon or any relief sought except the grounds and relief set out in the statement**: see now O. 53 rule 3(1) Rules of the High Court 1980. But as will be seen, at least two of them became transformed into something completely different.

(emphasis added)

[59] In the case of *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors* [2000] 4 CLJ 882; [2000] 1 MLRA 726; [2000] 3 MLJ 652; [1997] 3 AMR 2505, the Court of Appeal held as follows:

In the instant appeal before us, proceedings in the High Court were governed by O. 53 of the RHC where only affidavit evidence were relied upon by both sides. *Under O. 53 rule 1(2), the application for leave must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought. Under O. 53 rule 3(1) no other grounds or relief other than those set out in the statement shall be relied upon at the hearing of the originating motion on its merits*.

In his statement dated 23 March 1993, the appellant identified the following grounds on which he sought the order for *certiorari*.

(1) He was not informed of the charge against him.

(2) His supervisor had never complained about his work.

(3) The respondents had failed to inform him to be present at the disciplinary inquiry before the decision to dismiss him was made.

(4) The respondents had breached the rules of natural justice.

(5) The respondents' action had not followed established principles.

(6) He was not given the opportunity to defend himself.

(7) The respondents took into account irrelevant matters.

(8) The respondents failed to consider relevant factors.

(9) He was not given a warning before he was dismissed.

Clearly from the aforesaid grounds, the appellant never raised as issues his objections to the use of the phraseology "dan lain-lain maklumat yang berkaitan" and the loss of the opportunity to plead in mitigation. These two objections were only raised for the first time before us as in the court below the appellant was more content to submit on other issues. Order 53 rule 3(1) of the RHC

emphasis the principle that *a party is bound by his own pleadings and since that order and rule is mandatory in nature, the omission to plead in the statement the two objections raised before us is sufficient reason for us to hold that this appeal lack merits and on that conclusion we dismiss it with costs*, confirm the order of the High Court and order that the deposit be paid out to the respondents to account of their taxed costs.

(emphasis added)

[60] Given the above, it would not be open for the applicant to challenge the impugned decision by way of the averments in an affidavit in reply if the same was not pleaded in the statement.

[61] I have the opportunity to peruse the applicant's affidavit in reply (2) encl. 16, pp. 5 to 10, paras. 8 to 9, I find that the following grounds, which were raised in the applicant's affidavit in reply (2) were not pleaded by the applicant in the statement when the applicant averred as follows:

8. Merujuk kepada perenggan 9, khususnya perenggan 9.8 dan 9.9 Lampiran 15, saya dinasihati oleh peguamcara saya dan sesungguhnya percaya bahawa *alasan Responden yang mengatakan permohonan saya untuk menduduki peperiksaan Sijil Amalan Guaman tidak bermerit kerana saya kononnya tidak memenuhi keperluan Peperiksaan A-level adalah suatu pemikiran terkemudian (afterthought)*. Dalam perenggan 9, Responden sendiri mengatakan bahawa permohonan saya, (sama ada pada 04.09.2020 atau pada 10 December 2021 sepertimana yang didakwa oleh Responden dan yang dinafikan sekeras-kerasnya), tidak perlu diproses selanjutnya memandangkan kononnya saya tidak memenuhi keperluan Peperiksaan A-level (email Responden bertarikh 01.09.2020). Namun begitu, "alasan" tersebut:

(a) tidak konsisten dengan alasan penolakan permohonan saya seperti yang dinyatakan di dalam system Responden pada 24.05.2022. Dalam system Responden, Responden hanya mengatakan bahawa permohonan saya telah ditolak kononnya kerana saya hanya mempunyai "compensated pass" dalam Property Law sebagai salah satu subjek teras.

(b) tidak konsisten dengan alasan penolakan permohonan saya seperti yang dimaklumkan kepada saya oleh Responden melalui suratnya yang bertarikh 15 June 2022. Dalam surat tersebut (khususnya perenggan 5 dalam surat tersebut), Responden, melalui Pengarahnya Pn. Salwani Binti Abdullah, hanya mengatakan bahawa permohonan saya telah ditolak atas sebab saya tidak memenuhi syarat-syarat yang ditetapkan kerana saya kononnya hanya memperolehi keputusan "compensated pass" dalam salah satu mata pelajaran teras iaitu "Land Law"

(c) tidak konsisten dengan pengesahan (confirmation) pihak Responden bahawa permohonan saya telah ditolak atas sebab saya kononnya tidak memenuhi syarat-syarat untuk menduduki peperiksaan Sijil Amalan Guaman kerana saya hanya mempunyai "compensated pass" dalam salah satu subjek teras.

Pengesahan pihak Responden telah diberikan oleh Pengarahnya Pn Salwani Binti Abdullah melalui surat pihak Responden yang bertarikh 23.6.2022. Dalam surat ini, Responden telah menolak rayuan saya untuk menduduki peperiksaan Sijil Guaman yang telah dibuat melalui surat saya yang bertarikh 17.6.2022 (selepas menerima surat penolakan Responden pada 15.6.2022).

(d) Dalam Garis Panduan 1995, Responden tidak pernah mengatakan bahawa saya, selaku Mature Student yang terjatuh bawah kriteria yang lain (seperti yang dinyatakan bawah Garis Panduan 1995, seksyen Part 1 sub-seksyen I (Mature student Entry), perlu memenuhi apa-apa syarat berkenaan peperiksaan A-level ...

9. Tambahan pula, dalam perenggan 9.8 Lampiran 15, saya turut perhati bahawa Responden sendiri menggunakan frasa 'permohonan Pemohon selanjutnya' yang dengan jelasnya (dan/atau sepatutnya) mencerminkan bahawa permohonan saya tidak diproses langsung kerana ia adalah pendirian Responden sendiri bahawa saya tidak memenuhi keperluan peperiksaan A-level. *Namun begitu, saya perhati bahawa Responden, 'on the one hand' menyatakan bahawa permohonan saya tidak diproses langsung kerana saya tidak memenuhi keperluan peperiksaan A-level. Malah, 'on the other hand', bukan sahaja Responden telah memproses permohonan saya, Responden sanggup lagi menyatakan bahawa permohonan saya telah ditolak atas sebab saya hanya memperolehi 'compensated pass' dalam salah satu mata pelajaran teras. Saya dinasihati bahawa keputusan pada 24 Mei 2022 adalah, membantah (perverse), tidak adil dan tidak munasabah*.

(emphasis added)

[62] Based on the case laws above, the applicant is not allowed to ventilate arguments that are not pleaded in the statement. As such, this judicial review should be dismissed, given the patent inadequacy of the statement.

[63] Premised on the aforesaid reasons, I find that the PO raised by the respondent has merits and accordingly, I uphold the respondent's objection. However, for completeness, I will now deal with the merits of the application.

The Retrospective Ground

[64] The applicant claims that the impugned decision was based on the retrospective application of the said decision made at the 13 August 2021 meeting (encl. 3 p. 6, para. (j)).

[65] As the premise of the applicant's argument concerns retrospectively, the timing of the applicant's application to be registered for the CLP examination holds the utmost significance.

[66] It is to be noted that on 4 September 2020, the applicant merely logged in through the e-LPQB portal before the 2021 CLP examination was open for registration. This was, in any event, only to proceed with an application,

but does not reflect the applicant's submission of an application to be registered for the CLP examination (encl. 15, p. 16, para. 7.2). At that time, the applicant was not considered to have made a valid application to register for the 2021 CLP examination, as it was before the registration time frame (encl. 12, pp. 46 to 48).

[67] The above fact can be gleaned from the following:

(i) the main page of the respondent's e-LPQB portal makes a clear distinction between 'Daftar Pemohon' and 'Pendaftaran Permohonan Peperiksaan' (encl. 15, p. 24);

(ii) the respondent's 'Panduan Manual Pengguna (Baru)' (the respondent's user manual) states that the Daftar Pemohon' section is for '... calon yang ingin membuat permohonan, perlu mendaftar terlebih dahulu' (encl. 15 p. 26). The respondent's user manual is accessible by the public *vide* the main page of the respondent's e-LPQB portal;

(iii) in the respondent's user manual, it is also stated that once the notification appears that the candidate's application is successful, the candidate will be provided with a link to continue the payment process for the registration of the CLP examination (encl. 15, p. 37); and

(iv) accordingly, there was no 'pending' application made by the applicant on 4 September 2020 to register for the CLP examination.

[68] Added to that, the following chronological of events shows the absence of the element of retrospectively in respect of the impugned decision:

(i) the respondent decided at the 13 August 2021 meeting that candidates who have received a 'compensated pass' for any of their core subjects will not be eligible to be registered for the CLP examination (encl. 12, pp. 49 to 53);

(ii) evidence shows that the applicant had only validly applied to be registered for the CLP examination on 10 December 2021 (and not 4 September 2020, as alleged) (encl. 12, p. 54); and

(iii) it is clear that the decision made at the 13 August 2021 meeting preceded the applicant's registration for the CLP examination.

[69] Therefore, this court finds that the impugned decision was premised on the respondent's rejection of the applicant's 2022 CLP examination registration on 10 December 2021, which occurred after the 13 August 2021 meeting and not the applicant logging into the e-LPQB portal on 4 September 2020.

[70] There is no basis for the respondent to reject the applicant's purported application to be registered for the CLP examination on 4 September 2020, as there was no examination that was open for registration at that material time (encl. 12, p. 46). The question of retrospectivity of the impugned decision does not arise.

'Pass' v. 'Compensated Pass'

[71] The applicant submits that 'compensated pass' has been accepted previously by the respondent as a "pass".

[72] However, I find that the applicant has failed to present any evidence supporting the respondent's purported representation that it previously recognised a 'compensated pass' as a 'pass'.

[73] Further, there are available resources to the applicant (*ie*, the 1995 Guidelines and "statement on six core subjects") demonstrating the respondent's treatment of a 'compensated pass'. It was therefore the applicant's responsibility to be properly informed about the CLP examination requirements.

[74] The respondent's consistent rejection of applicants who obtained a 'compensated pass' is evident from the following documents:

(i) the respondent's letter dated 23 June 2022 to the applicant, which stated that the respondent had rejected CLP examination registrants who obtained a 'compensated pass' since 2016 (encl. 12, p. 66):

> 4. Untuk makluman tuan, Lembaga sebelum ini juga telah menolak permohonan graduan Ijazah Sarjana Muda Undang-Undang tahun 2019 dari University of London yang memperoleh keputusan 'compensated pass' pada tahun 2016 bagi mata pelajaran teras.

(ii) the decision made at the 13 August 2021 meeting (encl. 12, pp. 49 to 53).

[75] More importantly, I find that the applicant did not contest these decisions when he was informed of them.

[76] This court's view that the absence of 'complaints' from the respondent regarding the applicant's 'compensated pass' when it was purportedly informed on 27 May 2020 does not amount to an acceptance of the same. This is because the applicant had not made any CLP examination application at that time for the respondent's consideration.

[77] Given the above, this court finds that the applicant's claim that a 'compensated pass' has historically been accepted by the respondent ought to be dismissed.

[78] The applicant further contends that the respondent is not cloaked with the jurisdiction to classify a 'compensated pass' as a 'fail' (encl. 18, pp. 47 to 50, paras. 62 to 70). However, I find this contention is without merit.

[79] It is undisputed that the respondent, under the Act, has the autonomy to establish the pre-requisites for registering for the CLP examination. The autonomy is recognised by the courts as matters within the prerogative of the relevant institution.

[80] The court's reluctance to interfere with matters of qualification is demonstrated in the Court of Appeal case of *Sivapalan Govindasamy v. Universiti Malaya* [2020] 9 CLJ 638; [2020] MLRAU 105; [2020] 12 MLJ 354 where it was held that academic judgment and/or academic matters are not amenable to the supervision of the court when it held as follows:

> [81] It is noteworthy that in *Amir*'s case the High Court had refused to intervene in the powers of the Vice Chancellor of the University conferred under section 18 in the decision not to reappoint a dean of a Faculty on the premise that it involved 'academic judgment', to be resolved internally. *In our considered view, on the facts of the instant case, the grounds for non-interference are stronger by far as the decision is directly related to an academic matter ie, the requirements to be satisfied by a PhD thesis in order to be conferred a PhD.* Senate, a body constituted under UCCA 1971 has been conferred express powers of control and direction, and amongst others to formulate policies in respect of instruction and research. *The Guidelines which amongst others, stipulate the date of a thesis to be the date of final submission has been adopted by Senate to apply to all candidates of PhD programs. This requirement of the current dating of a thesis is consistent with the maintenance of academic standards which is one of the functions that is legally empowered to Senate. It is not open to courts to review the merits of such Guidelines or policies.*
>
> [82] *The exclusive jurisdiction of a university to determine whether a candidate has satisfied the requirements to be conferred a degree is indisputably an academic matter not amenable to the supervision of courts …*
>
> (emphasis added)

[81] In the instant case, the respondent has established that candidates must achieve a 'pass' for all six core subjects of the LLB to be eligible for CLP examination registration (encl. 12, pp. 37 to 38). The 1995 Guidelines make no mention of accepting a 'compensated pass' as equivalent to a 'pass'.

[82] In any event, the applicant had narrowly failed the Property Law module on two out of three attempts at the module, resulting in a 'compensated pass' under reg. 8.7 for the University of London Undergraduate Laws 2018-2019 Regulations (encl. 12, pp. 68 to 69).

[83] It should be noted that:

(i) by way of the University of London's email to the respondent on 31 July 2021 (encl. 12, pp. 102 to 112), the respondent received a response on how a 'compensated pass' was awarded to students who had failed a particular exam;

(ii) the respondent considered the University of London's response during the 13 August 2021 meeting, where it re-affirmed its decision that a 'compensated pass' is not deemed to be a 'pass' and therefore, rejected the CLP examination registration applications of 12 other candidates who received a 'compensated pass' or 'condoned' in one of their core subjects (encl. 12, pp. 49 to 53);

(iii) by way of the University of London's email to the respondent on 1 November 2022 (encl. 12, p. 68), the respondent had merely received confirmation that the reasoning behind the applicant receiving a 'compensated pass' aligned with the explanation provided in the University of London's email dated 31 July 2021;

(iv) it is evident from both the University of London's emails dated 31 July 2021 and 1 November 2022 that when candidates (including the applicant) receive a 'compensated pass', it means that they had in fact failed that particular module; and

(v) therefore, the applicant had in fact failed one of his core subjects, being Property Law, before he was given a 'compensated pass'.

[84] Thus, this court is of the view that it is well within the respondent's authority to equate a 'compensated pass' to a 'fail' under the 1995 Guidelines.

[85] It is not disputed that prevailing academic judgment in this context rests with the respondent itself, being the statutory body empowered to uphold the requisite standard for admission into the Malaysian Bar.

[86] Therefore, the respondent's non-acceptance of a 'compensated pass' does not amount to a challenge to the University of London's grading structure or its decision to award a 'compensated pass'.

[87] Instead, for the purposes of regulating qualifications for admission as an advocate and solicitor to the Malaysian Bar, the respondent is empowered to determine if the 'compensated pass' grade aligns with its requirements that there be a 'pass' and not a form of a handicapped pass.

[88] Further, this court also finds that at all material times, a 'compensated pass' does not qualify as a 'pass' for any core subjects for the purposes of eligibility to be registered for the CLP examination.

[89] This is clear from a plain and ordinary reading of the 1995 Guidelines, which makes no provision that a 'compensated pass' qualifies.

[90] Unless the context otherwise permits, it would be impermissible for the Honourable Court to read words into the 1995 Guidelines. This is particularly because administrative circulars have been interpreted literally,

based on their plain and ordinary meaning based on the Court of Appeal case of *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2018] 2 CLJ 762; [2017] 6 MLRA 614; [2017] 4 MLJ 521; [2017] 4 AMR 527.

[91] In the above regard, for the purposes of registering for the CLP examination, the relevant qualifications are as stated in the 1995 Guidelines which was issued by the respondent on 18 March 1995:

(i) Part 1, r. D(iv) of the 1995 Guidelines states that candidates must pass all core subjects (encl. 12, pp. 37 to 38);

(ii) there is no mention of a 'compensated pass' being accepted and/or equivalent to a 'pass' in the 1995 Guidelines;

(iii) the respondent had once again on 17 June 2005 stated in 'a statement on six core subjects' that "candidates must pass the following six core subjects ... v) Land Law ...." (encl. 12, p. 45); and

(iv) based on the above, this court views that the respondent has consistently taken the position that candidates must pass all six core subjects and never once equated a 'compensated pass' to a 'pass'.

Applicant's Knowledge Of The CLP Examination

[92] The applicant was, at all material times, aware of the requirements to be eligible to be registered for the CLP examination as stated in the 1995 Guidelines and 'a statement on six core subjects'. Those requirements do not state that a 'compensated pass' would qualify as a 'pass' for any core subjects for the purposes of eligibility to be registered for the CLP examination.

[93] The requirements to sit for the CLP examination were at all material times readily available and accessible to the public. This information is in fact featured on the e-LPQB website.

[94] Therefore, the applicant's contention that the CLP examination requirements were not made known to him at any time before he made his application to sit for the CLP examination is untenable and devoid of merits.

The 13 August 2021 Meeting

[95] Further, this court is of the view that the said decision made at the 13 August 2021 meeting was valid and reasonable for the following reasons:

(i) one of the agendas of the 13 August 2021 meeting was to discuss the CLP examination applications of candidates who had received a "compensated pass" on one of their core subjects (encl. 12, p. 50);

(ii) the respondent was made to understand that where students were given a "compensated pass" in a particular subject, the candidate had in actuality failed the said subject (encl. 12, p. 51);

A (iii) the University of London had informed the respondent that, amongst others, there were two ways in which a student could be granted a compensated pass (encl. 12, pp. 83 and 105):

(a) the first is under reg. 8.7 of the University of London Undergraduate Laws Regulations 2020-2021, where the student has made three attempts at the examination and narrowly failed the module, gaining a mark of 35% - 39%; and

B

(b) the second is under reg. 8.8 of the University of London Undergraduate Laws Regulations 2020-2021 where the student is a finalist and has narrowly failed one module. In this case, the student may request a compensated pass in order to graduate.

C

(iv) based on the above, the respondent had decided to reject all applications where the applicants had received a "compensated pass" in one of their core subjects;

D (v) this is consistent with the respondent's previous decisions to reject applications where the candidate was a University of London LLB graduate who had received a "compensated pass" on one of his core subjects (encl. 12, p. 29, para. 14(2)(i)); and

E (vi) therefore, at all material times, the respondent had not accepted a "compensated pass" as a "pass".

[96] Based on the above, this court is of the considered view that the respondent's decision is made in accordance with the applicable guidelines, which does not warrant intervention by this court.

F **Relevant Considerations In Arriving At The Impugned Decision**

[97] The applicant further submits that the respondent took into account irrelevant considerations when making the impugned decision. Specifically, the contention revolves around the correspondence exchanged between the respondent and the University of London between 27 July 2021 and 31 July 2021.

G

[98] This court views that the respondent's attempt to seek clarification from the University of London regarding the criteria for awarding the grade of 'compensated pass' to other candidates can hardly be regarded as irrelevant to the applicant's case.

H

[99] This court finds that the essence of these inquiries was to comprehend the basis upon which the University of London assigned the 'compensated pass' grade, and for the respondent to decide if the said grade aligns with its eligibility criteria for registering for the CLP examination.

I

[100] In respect of the applicant's case, the respondent corresponded with the University of London on 28 October 2022 to inquire about how the applicant was awarded the 'compensated pass'.

[101] This court finds that the respondent's precautionary measure of seeking clarification from the University of London on 28 October 2022 should not be used against the respondent – especially since the explanation received from the University of London did not differ from the explanation provided concerning other candidates at the 13 August 2021 meeting.

[102] It must also be emphasised that the impugned decision was not premised on the correspondence with the University of London on 28 October 2022 and 1 November 2022. Instead, it was grounded in the 1995 Guidelines, the 'statement on six core subjects' and the 13 August 2021 meeting.

[103] In light of the rejection of various applications akin to the applicant's and the efforts made by the respondent to seek clarification from the University of London, this court views that relevant considerations have been properly taken into account by the respondent.

[104] Based on the above, the impugned decision was therefore not unfair, illegal or irrational in the *Wednesbury* sense, and was not based on the retrospective application of guidelines or the said decision made at the 13 August 2021 meeting.

The Legitimate Expectation Ground

[105] The applicant claims that he had a legitimate expectation at the time of making his purported application on 4 September 2020 to be registered for the CLP examination.

[106] According to the applicant, he had a legitimate expectation that any purported change in policy would not affect his substantive rights to be registered for the CLP examination at the time of making his purported application on 4 September 2020.

[107] The applicant has to show to this court that the representation was a clear and unambiguous promise; an established practice or a public announcement made by the respondent to the applicant.

[108] The above principle has been established in the following cases:

(i) the Court of Appeal in the case of *Zakiah Ishak v. Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77; [2005] 2 MLRA 326; [2005] 6 MLJ 517 held as follows:

> [16] Secondly it was contended on her behalf that the termination was in breach of her legitimate expectation that she could continue in her employment for the said period. **In law for legitimate expectation to**

A **arise there must be evidence of a promise or undertaking made by the respondent to that effect. We find no such evidence before the court**. On that premise we find that her claim for breach of legitimate expectation is wholly unsustainable.

(emphasis added)

B (ii) in the case of *Ambiga Sreenevasan v. Director Of Immigration, Sabah, Noor Alam Khan A Wahid Khan & Ors* [2017] 9 CLJ 205; [2017] 6 MLRA 33; [2018] 1 MLJ 633, the Court of Appeal held that:

[52] The principle of legitimate expectation has been accepted by our law ... The doctrine of legitimate expectation protects both procedural
C and substantive rights.

[53] The doctrine of legitimate expectation originates from common law principles of fairness. English courts developed this doctrine clearly to encourage good administration and prevent-abuses by decision-makers ... Generally, the courts will grant judicial review of an administrative decision based on individual's legitimate expectation if
D a public authority has made a representation to the individual within its powers. **The individual has to show that the representation was a clear and unambiguous promise, an established practice or a public announcement. This is largely factual inquiry** ...

(emphasis added)

E (iii) in the case of *YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor* [2021] 8 CLJ 179; [2021] 5 MLRA 476; [2021] 6 MLJ 496, the Federal Court held as follows:

[95] *The courts will generally grant judicial review of an administrative*
F *decision premised on legitimate expectation where a public authority has made a representation or promise to the individual within its powers. In other words, the representation and promise must be within the law. In addition, the individual has to show that the representation was a clear and an unambiguous promise, an established practice or a public announcement*.

(emphasis added)

G **[109]** The applicant claims that it was represented to him that a "compensated pass" would be accepted by the respondent as:

(i) the 1995 Guidelines do not explicitly exclude 'compensated pass' as a requirement for the CLP examination registration, and further, there
H was no administrative decision issued by the respondent that a 'compensated pass' was unacceptable (encl. 18 pp. 15 to 16 and 20 to 21, paras. 26 to 28 and 40); and

(ii) the respondent was always aware of the University of London granting a 'compensated pass' for its core subjects, but only at the 13 August 2021
I meeting decided to exclude 'compensated pass' from its qualifications (encl. 18, pp. 16 to 20, paras. 29 to 39).

[110] However, I find the above conduct does not amount to a representation as none of the above is "a clear, unambiguous promise, an established practice or a public announcement" that the respondent had accepted a "compensated pass" from the University of London.

[111] It is clear from the plain and ordinary reading of the 1995 Guidelines, that it makes no provision that a "compensated pass" would qualify as a "pass" for any core subjects for the purpose of eligibility to be registered for the CLP examination.

[112] In fact, I find that the respondent has always required candidates to have obtained a "pass" for the core subjects in the candidates' LLB examination from as early as 1995, and has never accepted a "compensated pass".

[113] It is not proper for the applicant to argue that the absence of prohibition against a "compensated pass" must mean that the same is acceptable. I am of the view that the maxim of '*expressio unius est exclusio alterius*' (the express mention of one matter, implies the exclusion of matters which have not been mentioned) applies to render such an interpretation untenable.

[114] Clearly from the above facts, the respondent had not made any such representation to the applicant that he would be registered for the CLP examination. In fact, the registration process has always been qualified by the very existence of the 1995 Guidelines, which sets out the terms of registration (encl. 12, pp. 37 to 38).

[115] Further, the respondent was never bound to accept an applicant to be registered for the CLP examination until the applicant had officially been informed of their acceptance as a candidate.

[116] The above was clearly established and published to all potential candidates *via* the respondent's 'syarat-syarat kemasukan peperiksaan sijil amalan guaman 2022', as seen below (encl. 12, p. 123):

> Lembaga tidak terikat untuk menerima seseorang pemohon sebagai calon PSAG sehingga pemohon diberitahu secara rasmi tentang penerimaannya sebagai calon oleh Pejabat Lembaga.

[117] Thus, this court views that the applicant was at all material times aware that he would have to wait for an official response from the respondent for his application.

[118] It is to be noted that the respondent retained the discretion to accept or reject applications to register for the CLP examination. This is evident from the respondent's consistent past practices of rejecting applications where the candidate was a University of London LLB graduate who had received a "compensated pass" on one of their core subjects (encl. 12, para. 14(2)(i)).

[119] This court is of the view that the applicant could not have had a legitimate expectation to be registered for the CLP examination as of 4 September 2020 as there was no 'pending' application made by the applicant on 4 September 2020 to register for the CLP examination.

[120] More importantly, I find that the applicant has not provided any basis as to how a legitimate expectation has arisen.

[121] The applicant has not referred to any express promise or regular practice represented to him. He has merely sought to rely on the respondent's purported changes to the entry requirements to be registered for the CLP examination. However, this is based on an incorrect notion that there were in fact changes in the terms of registration for the CLP examination when none existed.

[122] Further, the applicant has not adduced any evidence to show a "compensated pass" being accepted and/or equivalent to a "pass" in the 1995 Guidelines.

[123] The applicant also has not adduced any evidence that his award of "compensated pass" by the University of London meant that he did not fail the said subject.

[124] On the other hand, I find that the respondent has adduced evidence to show that the impugned decision was based on the 1995 Guidelines.

[125] Based on the above stated reasons, this court is of the view that the applicant's claim of legitimate expectation ought to be dismissed.

Consistency Of The Impugned Decision

[126] The applicant further contends that the impugned decision renders the respondent's position inconsistent given the following matters:

(i) the respondent allegedly failed to inform the applicant on 1 September 2020 that his purported registration for the CLP examination was improper due to the 'compensated pass' that he had obtained (encl. 18, pp. 11 to 13, paras. 18 to 22); and

(ii) the applicant's purported registration for the CLP examination was not processed *ab initio* due to the non-compliance with the A-levels examination requirement under the 1995 Guidelines, which the impugned decision did not specify on (encl. 18, pp. 13 to 14, paras. 23 to 25).

[127] This court is of the view that the respondent was not required to address the issue of the applicant's 'compensated pass' for Property Law as of 1 September 2020 because there was no valid application by the applicant for the CLP examination at the material time.

[128] Importantly, I find that the series of correspondence that took place between the applicant and respondent in September 2020 was merely a response to the applicant's queries, which could not be considered as constituting a "decision" to reject any purported application to be registered for the CLP examination. Again, this is because the applicant had not submitted any application for registration at that time.

[129] This court is of the view that the fact that the respondent did not need to process the applicant's application further due to non-compliance with the A-levels examination requirement does not create inconsistency in the impugned decision.

[130] The applicant's 2022 CLP examination registration was indeed processed, but rejected because of the 'compensated pass' based on the 1995 Guidelines. This formed the basis of the impugned decision (encl. 12, p. 60).

[131] Thus, the question of the inconsistency of the impugned decision does not arise in this case.

Full And Frank Disclosure

[132] Having perused the cause papers, I find that the applicant had failed to adhere to its duty of full and frank disclosure in this judicial review at the leave stage.

[133] This is because, the applicant has omitted to bring to the attention of this court:

(i) his letter dated 7 June 2022 to the respondent, which categorically stated that his application to sit for the CLP examination was made in December 2021 (encl. 12, pp. 61 to 62, exh. 'LPQB-8').

> 3. *Permohonan saya pada bulan Disember 2021 untuk menduduki peperiksaan tersebut telah ditolak pada 31 Mei 2022 atas sebab saya telah memperolehi suatu "compensated pass" untuk subjek 'Land Law'*, walaupun saya telah memenuhi garis panduan dan telah memperolehi Second Class Lower Law Degree.
>
> (emphasis added)

(ii) the applicant failed to exhibit the payment he made in December 2021 as part of the registration to sit for the CLP examination.

[134] The applicant submits that the Honourable Attorney-General (AG) did not raise any objections at the leave stage and there was no application made to set aside the leave order. Consequently, the applicant argued that the material non-disclosure of facts has been waived.

[135] It is clear from the above, that for this court to grant leave, the applicant must produce all relevant and material facts/documents/cause papers before the court can fully determine if the applicant had *prima facie* an arguable case for the relief being sought and that the said application was neither frivolous nor vexatious.

[136] I find support for my view based on the Supreme Court decision in *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 1 MLRA 536; [1995] 2 MLJ 442 when it was held as follows:

> [1] Any application under O. 53 r. 1(2) must be drafted in such a way as to ensure that it contains all or substantial particulars of the facts and matters on which the applicant intends to rely in support of his application. *The Affidavit in Support* thereof must also be sufficiently *detailed and comprehensive and must exhibit all the relevant documentary exhibits. The contents of the affidavit here left much to be desired so much so that there was insufficient material for the Judge below to have granted leave*.
>
> [2] As *the application for leave to apply for certiorari is made ex-parte, there is a clear duty of disclosure imposed by law on the applicant, the breach of which may result in the order for leave being set aside*. On the facts however, the respondent was not guilty of any non-disclosure.
>
> (emphasis added)

[137] Further, in the case of *Mior Rosli Mior Mohd Jaafar v. Mahkamah Perusahaan Malaysia & Anor* [2010] CLJU 1539; [2010] 1 LNS 1539; [2010] 12 MLRH 352, Mohd Zawawi Salleh J (as he then was) held as follows:

> [15] It is not disputed that the *applicant, in his Supporting Affidavit, failed to exhibit the following cause papers or documents which had been before the Industrial Court*:
>
> (a) applicant's statement of case;
>
> (b) Second respondent's statement in reply;
>
> (c) applicant's bundle of documents;
>
> (d) Second respondent's bundle of documents;
>
> (e) Loose documents respectively marked as 'CO-1', 'CO-2', 'CO-3' and 'CO-4';
>
> (f) applicant's witness statement; and
>
> (g) Second respondent's witness statement.
>
> [16] *As a result of the applicant's foregoing failure, the applicant, in obtaining leave on 24.4.2009 to apply for judicial review, had suppressed and/or failed to declare and produce all material facts and documents, and had further engaged in a selective presentation of documents*.
>
> [17] The applicant in fact acknowledges his failure at paragraphs 30 of the said Supporting Affidavit.

> [18] *At the material time the court granted leave to the applicant, it did not have all relevant and material facts/documents/cause papers before it in order to fully determine if the applicant had prima facie an arguable case for the relief being sought* and that the said application was neither frivolous nor vexatious.
>
> (emphasis added)

(See also *Suruhanjaya Perkhidmatan Awam Malaysia v. Noordin Hassan* [1996] 1 CLJ 274; [1996] 1 AMR 030; [1995] 2 MLRA 185; [1995] 3 MLJ 495).

[138] Based on the above, it is trite that it is the duty of a person applying for *certiorari* to show the utmost good faith in the presentation of the material upon which he wishes the court to rely. Failure to do so, may result in the order for leave being refused and/or set aside.

[139] This court is of the considered view that the applicant had failed to exhibit all the relevant documents to ensure that the court has a complete picture of the case.

[140] The applicant's failure to disclose the material facts here was for a specific purpose:

(i) the applicant's grounds for judicial review include, amongst others, challenging the retrospective of the decision made at the 13 August 2021 meeting, as he contended that the decision cannot apply retrospectively to his purported application to sit for the CLP examination on 4 September 2020;

(ii) the date of the applicant's application to sit for the CLP examination is therefore of utmost importance as it forms the central point on the question of retrospectivity. This ground resulted in the granting of leave; and

(iii) had the applicant disclosed the fact that he had made an application in December 2021 and had made a payment as part of the registration at the leave stage, the retrospective point would have been a non-starter as the applicant's application to sit for the CLP examination did not precede the decision at 13 August 2021 meeting, but the application was made after the decision and would apply to bind his application.

[141] This court views that the material non-disclosure was a deliberate act to sustain a legal point that would not otherwise be open to the applicant. Further, by doing so, the applicant intended to show that he had been unfairly treated by the respondent, as he had substantive rights (a pending application) that had been extinguished by the retrospective decision of the respondent.

[142] It is my view that the fact that the leave order was not set aside does not bar the respondent from raising the applicant's non-disclosure at the substantive stage. This is because this court possesses the inherent jurisdiction to determine if the judicial review can be sustained in the light of a material non-disclosure at the leave stage (see *President Hotel Sdn Bhd v. Datuk Bandar & Anor; Crest Trading Sdn Bhd (Intervener)* [1995] CLJU 167; [1995] 1 LNS 167; [1995] 4 MLJ 517; [1995] 4 MLRH 514; [1995] 3 AMR 2350).

Mandamus

[143] One of the reliefs sought by the applicant is a *mandamus* order that the respondent immediately registers the applicant as a candidate for the CLP examination.

[144] The Federal Court in *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641; [2008] 1 MLRA 705, held that an order of *mandamus* can be granted either:

(i) under s. 44 of the Specific Relief Act 1950 (SRA); or

(ii) the additional powers of the High Court provided by para. 1 of the Schedule to the Courts of Judicature Act 1964 (CJA).

[145] It is also to be noted that O. 53 r. 1(2) of the ROC provides that this order (O. 53) is subject to the provisions of Chapter VIII of Part 2 of the SRA.

[146] Therefore, any application for an order of *mandamus* made by way of judicial review proceedings must comply with the requirement of s. 44 of the SRA.

[147] Section 44 of the SRA reads as follows:

> **Enforcement Of Public Duties**
>
> **Power to order public servants and others to do certain specific acts**
>
> 44. (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
>
> Provided that:
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
>
> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a Judge:

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[148] In *Koon Hoi Chow v. Pretam Singh* [1972] CLJU 56; [1972] 1 LNS 56; [1972] 1 MLJ 180B; [1972] 1 MLRH 497, Sharma J (as he then was) had outlined four prerequisites essential to the issue of an order under s. 44 of the SRA or a *mandamus*:

(i) whether the applicant has a clear and specific legal right to the relief sought;

(ii) whether there is a duty imposed by law on the respondents;

(iii) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondents; and

(iv) whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him.

[149] Based on the case, in order to issue the order of *mandamus*, the applicant must show not only that he has a legal right to have the act performed but that the right must be so clear, specific, and well defined as to be free from any reasonable controversy. The order cannot be issued when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent will deny the order of *mandamus*.

[150] Another important hurdle that needs to be crossed by the applicant for an order of *mandamus* is to show that there is a duty imposed by law on the respondent. In the absence of such legal duty, the *mandamus* shall not lie against the respondent.

[151] Based on the above, I am of the considered view that the applicant has failed to satisfy the requirements of a *mandamus* order:

(i) the applicant does not have a clear and specific legal right in the Act, any statute or otherwise to the relief sought;

A (ii) there is no duty imposed on law for the respondent to accept all applications for registrations for the CLP examination;

(iii) the respondent retained the discretion to accept or reject applications to register for the CLP examination; and

B (iv) the applicant has an alternative remedy, other than by way of *mandamus*, pursuant to s. 26 of the Act to review the decision of the respondent.

Conclusion

[152] Based on the reasons given above, this court is of the view that the C decision to reject the applicant's application to register for the CLP examination was valid, made in good faith and was reasonable in light of all the materials and evidence considered by the respondent at the material times.

[153] Premised on the aforesaid reasons, I am of the view that the decision D of the respondent is not tainted with any error of law, irrationality and/or unreasonableness that warrants the intervention of this court.

[154] As such, the applicant's application for judicial review (encl. 8) is dismissed with costs of RM10,000 subject to the allocatur.

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